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TITLE 28

WILLS, ESTATES, AND FIDUCIARY RELATIONSHIPS

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SUBTITLE 1. GENERAL PROVISIONS

CHAPTER 1

GENERAL PROVISIONS

28-1-102. Definitions.

CASE NOTES

Person.

Probate court erred in finding that the limited liability company lacked standing to bring a petition for the determination of heirship, because the limited liability company alleged in the petition that it was a legal entity, so it was a person and could bring the petition; "person" was defined under subdivision (18) of this section to include a corporation, partnership, or other legal entity. McVesting, LLC v. Heirs of Macie McGoon, 2012 Ark. App. 541, — S.W.3d — (2012).

28-1-104. Probate proceedings.

CASE NOTES

Adoption.

For purposes of § 9-9-212, appellants claimed that the failure to file a home study for the adoption of the child was jurisdictional and required reversal; however, under subdivision (5) of this section, the trial court had jurisdiction to determine the child's adoption and any error in relying on appellees' home study had to be raised in the trial court, and the court affirmed on this point without reaching the merits of the argument because it was

not preserved for review, as appellees' home study was admitted without objection and appellants did not raise their argument below and it was not considered by the trial court. Wilson v. Golen, 2013 Ark. App. 267, — S.W.3d — (2013).

28-1-115. Vacation and modification of orders.

CASE NOTES

Jurisdiction.

Probate court had jurisdiction to set aside its previous order determining heirship, because there was an extended period during which courts had jurisdiction to modify or vacate orders in probate proceedings, there had not been a final termination of the proceedings, and it was not entirely clear that the order determining heirship would have ended the proceedings. McVesting, LLC v. Heirs of Macie McGoon, 2012 Ark. App. 541, — S.W.3d — (2012).

28-1-116. Appeals.

CASE NOTES

Analysis

Jurisdiction.
Stay.

Jurisdiction.

Probate court had jurisdiction to set aside its previous order determining heirship, because there was an extended period during which courts had jurisdiction to modify or vacate orders in probate proceedings, there had not been a final termination of the proceedings, and it was not entirely clear that the order determining heirship would have ended the proceedings. McVesting, LLC v. Heirs of Macie McGoon, 2012 Ark. App. 541, — S.W.3d — (2012).

Stay.

In response to a jurisdictional argument under subdivision (e)(1) of this section, an appellate court considered a recusal argument in a probate matter out of an abundance of caution, even though there were no specific findings of no prejudice or a specific order permitting further proceedings in the order of a companion case. Ashley v. Ashley, 2012 Ark. App. 230, — S.W.3d — (2012).

SUBTITLE 2. DESCENT AND DISTRIBUTION

CHAPTER 11

DOWER AND CURTESY

SUBCHAPTER.
2. Entitlement Generally.

Subchapter 2 — Entitlement Generally

SECTION.
28-11-204. Murder of spouse — Effect.

28-11-204. Murder of spouse — Effect.

(a) Whenever a spouse shall kill or slay his or her spouse and the killing or slaying would under the law constitute murder, either in the first or second degree, and that spouse shall be convicted of murder for the killing or slaying, in either the first or second degree, the one so convicted shall not be endowed in the real or personal estate of the decedent spouse so killed or slain.

(b) In the event that a decedent spouse under this section dies without a will, the descendents of the one so convicted shall not benefit from the estate of the decedent spouse unless the descendents of the spouse that committed the murder are also descendants of the decedent spouse.

History. Acts 1939, No. 313, § 3; A.S.A. 1947, § 61-230; Acts 2013, No. 1019, § 1.

Amendments. The 2013 amendment added (b).

SUBTITLE 3. WILLS

CHAPTER 26

CONSTRUCTION AND OPERATION

28-26-104. Failure of a testamentary provision.

CASE NOTES

Death of Legatee or Devisee Prior to Testator.

Circuit court erred in ruling that the interests of beneficiaries who predeceased the surviving settlor of an inter vivos trust lapsed upon the death of the beneficiaries; rather, the beneficiaries' descendants were entitled to the beneficiaries' shares of the trust distribution upon the settlor's death. Tait v. Cmty. First Trust Co., 2012 Ark. 455, — S.W.3d —, 2012 Ark. LEXIS 487 (Dec. 6, 2012).

SUBTITLE 4. ADMINISTRATION OF DECEDENTS' ESTATES

CHAPTER 39

RIGHTS OF SURVIVING FAMILY MEMBERS

SUBCHAPTER.

Subchapter 3 — Assignment of Dower and Curtesy

SECTION.

28-39-303. Proceedings for allotment.

(a) If dower or curtesy is not assigned to the surviving spouse within one (1) year after the death of his or her spouse, or within three (3) months after demand made therefor, the surviving spouse may file a written petition in the circuit court. This petition shall include a description of the lands in which he or she claims dower or curtesy, the names of those having interest in the lands, and the amount of the interest briefly stated in ordinary language with a prayer for the allotment of dower or curtesy. All persons interested in the property shall be summoned to appear and answer the petition.

(b) Upon the petition's by all interested in the property being filed, or upon a summons being served upon all who have an interest in the property, the circuit court may make an order for the allotment of dower or curtesy according to the rights of the parties by commissioners appointed according to law.

(c) Parties interested may be constructively summoned, as provided by Rule 4 of the Arkansas Rules of Civil Procedure.

(d)(1) No verification shall be required to the petition or answer.

(2) Petitions for dower or curtesy shall be heard and determined by the court without the necessity of formal pleading upon the petition, answer, exhibits, and other testimony.

(e) If the petition is filed against infants or persons of unsound mind, the guardian or committee may appear and defend for them and protect their interests, and, if the guardian or committee does not appear and defend, the court shall appoint some discreet person for that purpose.

(f) If any person summoned, as provided in this section, desires to contest the rights of the petitioner or the statements in the petition, he or she shall do so by a written answer, and the questions of the law and fact thereupon arising shall be tried and determined by the circuit court.

(g) The costs of the division and allotment shall be apportioned among the parties in the ratio of their interests, and the costs arising from any contest of fact or law shall be paid by the party adjudged to be in the wrong.

History. Rev. Stat., ch. 52, §§ 32, 37, 39; Civil Code, §§ 538-541, 543, 547, 548; C. & M. Dig., §§ 3547-3552, 3560; Pope's Dig., §§ 4433-4438, 4446; Acts 1981, No. 714, §§ 52-54; A.S.A. 1947, §§ 62-704 — 62-710, 62-721; Acts 2003, No. 1185, § 275; 2013, No. 1148, § 59.

Amendments. The 2013 amendment substituted "by Rule 4 of the Arkansas Rules of Civil Procedure" for "in § 16-58-130" in (c).

CHAPTER 40

PROBATE AND GRANT OF ADMINISTRATION

Subchapter 1 — Proceedings Generally

28-40-113. Contest of will generally.

CASE NOTES

Timely Filing.

Legal malpractice suit based on an attorney's handling of an estate was not ripe for adjudication because a challenge could still be raised in the probate proceedings since the longer limitations period for challenges based on discovery of another will applied, even if the challenge was supported by a copy of the will. Kennedy v. Ferguson, 679 F.3d 998 (8th Cir. 2012).

CHAPTER 41

DISTRIBUTION WITHOUT ADMINISTRATION

SECTION.

28-41-101. Collection of small estates by distributee.

(a) The distributee of an estate shall be entitled thereto without the appointment of a personal representative when:

(1) No petition for the appointment of a personal representative is pending or has been granted;

(2) Forty-five (45) days have elapsed since the death of the decedent;

(3) The value, less encumbrances, of all property owned by the decedent at the time of death, excluding the homestead of and the statutory allowances for the benefit of a spouse or minor children, if any, of the decedent, does not exceed one hundred thousand dollars ($100,000);

(4) There shall be filed with the probate clerk of the circuit court of the county of proper venue for administration an affidavit of one (1) or more of the distributees setting forth:

(A) That there are no unpaid claims or demands against the decedent or his or her estate, that the Department of Human Services furnished no federal or state benefits to the decedent, or, that if such benefits have been furnished, the department has been reimbursed in accordance with state and federal laws and regulations;

(B) An itemized description and valuation of the personal property and a legal description and valuation of any real property of the decedent, including the homestead;

(C) The names and addresses of persons having possession of the personal property and the names and addresses of any persons possessing or residing on any real property of the decedent; and

(D) The names, addresses, and relationship to the decedent of the persons entitled to and who will receive the property; and

(5) There is furnished to any person owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right, a copy of the affidavit certified by the clerk.

(b)(1)(A) The clerk shall file the affidavit, assign it a number, and index it as required by § 28-1-108(1).

(B) He or she shall make a charge of twenty-five dollars ($25.00) for filing the affidavit and five dollars ($5.00) for each certified copy.

(C) An order of the court or other proceeding is not necessary.

(D) An additional fee shall not be charged if a will is attached to the affidavit.

(2)(A) If an estate collected under this section contains real property, in order to allow for claims against the estate to be presented, the distributee shall cause a notice of the decedent's death and the filing of an affidavit for the collection of his or her estate to be published within thirty (30) days after the affidavit has been filed.

(B) The notice shall be in substantially the following form:

"In the Circuit Court of .....County, Arkansas
Probate Division
In the Matter of the Estate of ....., Deceased. No. .....
Name of decedent .....
Last known address .....
Date of death .....

On ....., an affidavit for collection of small estate by distributee was filed with respect to the estate of....., deceased, with the clerk of the probate division of the circuit court of .....County, Arkansas, under Ark. Code Ann. § 28-41-101.

The legal description of the real property listed in the affidavit is as follows:

.....

All persons having claims against the estate must exhibit them, properly verified, to the distributee or his or her attorney within three (3) months from the date of the first publication of this notice or they shall be forever barred and precluded from any benefit of the estate.

The name, mailing address, and telephone number of the distributee or distributee's attorney is:

.....

This notice first published ....., 20..."

(C) Publication of the notice shall be as provided in §§ 28-1-112(b)(4) and 28-40-111(a)(4).

History. Acts 1949, No. 140, § 66; 1951, No. 255, § 5; 1967, No. 287, § 4; 1975, No. 620, § 6; 1979, No. 641, § 1; 1981, No. 714, § 67; 1983, No. 133, § 1; A.S.A. 1947, § 62-2127; Acts 1987, No. 163, § 1; 1989, No. 960, § 1; 1993, No. 415, § 3; 1993, No. 687, § 1; 1999, No. 992, § 1; 2001, No. 1809, § 8; 2003, No.

1185, § 278; 2003, No. 1765, § 38; 2005, No. 899, § 1; 2011, No. 289, § 1; 2011, No. 761, § 1; 2013, No. 230, § 1.

Amendments. The 2013 amendment rewrote (b)(2)(B) and made stylistic changes.

CHAPTER 48

PERSONAL REPRESENTATIVES

SUBCHAPTER.
1. General Provisions.

Subchapter 1 — General Provisions

SECTION.
28-48-102. Letters — Issuance — Form.

28-48-102. Letters — Issuance — Form.

(a) When a duly appointed personal representative has given such bond as may be required and the bond has been approved by the court or by the clerk, subject to confirmation by the court, or, if no bond is required, when the personal representative has filed with the clerk a written acceptance of his or her appointment, letters under the seal of the court shall be issued to him or her.

(b) The letters shall be in substantially the following form:

"In the Circuit Court of ..... County, Arkansas.
In the Matter of the Estate of C.D., deceased.
No. .....

Letters of Administration (Testamentary)

Be it known that A.B., whose address is ....., having been duly appointed administrator of the estate (executor of the will) of C.D., deceased, who died on or about ...., 20...., and having qualified as such administrator (executor) is hereby authorized to act as such administrator (executor) for and in behalf of the estate and to take possession of the property thereof as authorized by law.

Issued this ....day of ...., 20.....
Clerk.
(Seal)"

(c) Letters of administration with will annexed, administration in succession, and special administration shall conform with this form with appropriate modifications.

(d)(1)(A) Letters of administration are not necessary to empower the person appointed to act for the estate.

(B) Letters of administration are for the purpose of notifying third parties that the appointment of an administrator has been made.

(2) The order appointing the administrator empowers the administrator to act for the estate, and any act carried out under the authority of the order is valid.

History. Acts 1949, No. 140, § 71; A.S.A. 1947, § 62-2202; Acts 2007, No. 438, § 1; 2013, No. 1137, § 1.

Amendments. The 2013 amendment substituted "Circuit" for "Probate" in (b).

28-48-105. Removal generally.

CASE NOTES

Review.

Decision not to remove the personal representatives was not clearly erroneous, because the appellate court could not say that the circuit courts decision had left a definite and firm conviction that a mistake had been committed, when the circuit court admonished the personal representatives to put the widow's interests above their own since they owed her a fiduciary duty, and the circuit court understood that there was animosity but noted that there would be court supervision of the probate process. Ashley v. Ashley, 2012 Ark. App. 236, — S.W.3d — (2012).

CHAPTER 53

DISTRIBUTION AND DISCHARGE

Subchapter 1 — General Provisions

28-53-101. Determination of heirship.

CASE NOTES

Analysis

Jurisdiction.
Standing.

Jurisdiction.

Probate court had jurisdiction to set aside its previous order determining heirship, because there was an extended period during which courts had jurisdiction to modify or vacate orders in probate proceedings, there had not been a final termination of the proceedings, and it was not entirely clear that the order determining heirship would have ended the proceedings. McVesting, LLC v. Heirs of Macie McGoon, 2012 Ark. App. 541, — S.W.3d — (2012).

Standing.

Probate court erred in finding that the limited liability company lacked standing to bring a petition for the determination of heirship, because the limited liability company alleged in the petition that it was a legal entity, so it was a person and could bring the petition; "person" was defined under § 28-1-102(18) to include a corporation, partnership, or other legal entity. McVesting, LLC v. Heirs of Macie McGoon, 2012 Ark. App. 541, — S.W.3d — (2012).

SUBTITLE 5. FIDUCIARY RELATIONSHIPS

CHAPTER 65

GUARDIANS GENERALLY

SUBCHAPTER.

1. General Provisions.
2. Appointment.
4. Termination of Guardianship.

SUBCHAPTER
7. PUBLIC GUARDIAN FOR ADULTS.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

28-65-101. Definitions.

CASE NOTES

Constitutionality.

On appeal of the order granting a permanent guardianship of appellant's son to his grandmother, the Supreme Court of Arkansas did not address the merits of appellant's constitutional challenge to the guardianship statutes, §§ 28-65-101 to 28-65-707, because the attorney general was not notified of the challenge as required by § 16-111-106(b) and there had not been a complete adversarial development of the constitutional issues. Mahavier v. Mahavier (In re A.M.), 2012 Ark. 278, — S.W.3d — (2012).

28-65-104. Incapacitated persons.

For purposes of this chapter, the following persons are incapacitated persons:

(1) Persons under age eighteen (18) whose disabilities have not been removed;

(2) Persons who are detained or confined by a foreign power or who have disappeared; and

(3) Persons under age twenty-one (21) who:

(A) Have reached eighteen (18) years of age;

(B) Have a current guardianship established based solely on the minority age of the person;

(C) Agree to allow the current guardianship to continue up to twenty-one (21) years of age; and

(D) Receive a guardianship subsidy paid for or approved by the Department of Human Services.

History. Acts 1985, No. 940, § 2; A.S.A. 1947, § 57-821; Acts 2013, No. 577, § 2.

Amendments. The 2013 amendment added (3).

28-65-107. Jurisdiction of courts.

(a) The jurisdiction of the circuit court over all matters of guardianship, other than guardianships ad litem in other courts, shall be exclusive, subject to the right of appeal.

(b) The provisions of this chapter shall not affect the jurisdiction of any court authorized to remove disabilities of minority.

(c)(1) If a juvenile is the subject matter of an open case filed under the Arkansas Juvenile Code of 1989, § 9-27-301 et seq., the guardianship petition shall be filed in that case if the juvenile resides in Arkansas.

(2) If the juvenile resides out of state through the Interstate Compact on the Placement of Children, § 9-29-201 et seq., the guardianship petition may be filed in Arkansas or it may be filed in the state in which the juvenile resides, subject to approval by the receiving state.

(3) The Department of Human Services may intervene as a matter of right in a guardianship action at any time before the entry of a permanent guardianship order if:

(A) A guardianship action is initiated for a child or adult in the custody of the department, including a seventy-two-hour hold; and

(B) The custody of the child or adult is granted to a party seeking guardianship.

(d) The appropriate jurisdiction for an adult guardianship action, excluding proceedings under the Adult Custody Maltreatment Act, § 9-20-101 et seq., under this chapter that involve a party residing outside the state shall be determined under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, § 28-74-101 et seq.

(e) The appropriate jurisdiction for an adult guardianship action under the Adult Custody Maltreatment Act, § 9-20-101 et seq., that involves a maltreated adult residing outside the state shall be determined under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, § 28-74-101 et seq.

History. Acts 1985, No. 940, § 5; A.S.A. 1947, § 57-824; Acts 2001, No. 1029, § 2; 2003, No. 1185, § 279; 2009, No. 301, § 1; 2011, No. 159, § 3; 2013, No. 577, § 3.

Amendments. The 2013 amendment added (c)(3).

Subchapter 2 — Appointment

SECTION.

28-65-203. Qualifications of guardian.

(a) A natural person who is a resident of this state, eighteen (18) or more years of age, of sound mind, not a convicted and unpardoned felon, is qualified to be appointed guardian of the person and of the estate of an incapacitated person.

(b) However, notwithstanding subsection (a) of this section, a natural person who is a resident of this state, eighteen (18) years of age or older, of sound mind, and a convicted and unpardoned felon whose home has been opened under § 9-28-409 either as a foster home or as an adoptive home is qualified to be a guardian of the person or estate of a minor in the custody of the Department of Human Services.

(c) Any charitable organization or humane society incorporated under the laws of this state is qualified for appointment as guardian of the person and estate of a minor:

(1) When the major portion of the support of the minor is being supplied or administered by the organization;

(2) When the court finds that:

(A) The minor has been abandoned by his or her parents; or

(B) The minor's parents are incapacitated or unfit for the duties of guardianship; or

(3) If no other suitable person can be found who is able and willing to assume the duties of guardianship.

(d)(1) A parent under eighteen (18) years of age is qualified for appointment as guardian of the person of his or her child.

(2) If the Department of Human Services consents, the department is qualified for appointment as guardian of the estate of a minor when the minor is in the custody of the department.

(e)(1) A corporation authorized to do business in this state and properly empowered by its charter to become guardian is qualified to serve as guardian of the estate of an incapacitated person.

(2) A bank or similar institution with trust powers may be appointed guardian of the estate of an incapacitated person.

(f)(1) A nonresident natural person possessing the qualifications enumerated in this section, except as to residence, who has appointed a resident agent to accept service of process in any action or suit with respect to the guardianship and has caused the appointment to be filed with the court, whether or not he or she has been nominated by the will of the last surviving parent of a minor resident of this state to be appointed as guardian of the minor, is qualified for the appointment.

(2) However, unless nominated by will, bond may not be dispensed with.

(g) A person whom the court finds to be unsuitable to perform the duties incident to the appointment shall not be appointed guardian of the person or estate of an incapacitated person.

(h) A sheriff, probate clerk of a circuit court, or deputy of either, or a circuit judge, shall not be appointed guardian of the person or estate of an incapacitated person unless the incapacitated person is related to him or her within the third degree of consanguinity.

(i)(1) Except as provided in subdivision (i)(4) of this section, a public agency or employee of any public agency acting in his or her official capacity shall not be appointed as guardian for any incapacitated person.

(2) An employee of a public agency that provides direct services to the incapacitated person shall not be appointed guardian of the person or estate of the incapacitated person.

(3) An employee of a public agency that provides direct services to the incapacitated person shall not be appointed as a temporary guardian.

(4) Notwithstanding any other provision of law, the Public Guardian for Adults may serve as guardian of the person or the estate, or both, of an incapacitated person receiving services from any public agency.

(5) The department shall promulgate rules to implement this provision.

(j) A person may be appointed temporary guardian of an incapacitated person notwithstanding the provisions of subsection (h) or sub-

section (k) of this section if he or she is related to the incapacitated person within the third degree of consanguinity and the court determines that any potential conflict of interest is unsubstantial and that the appointment is in the best interest of the ward.

(k) A circuit court of this state shall not appoint a person or institution as the permanent custodian or permanent guardian of the person or estate of an adult in the custody of the department unless:

(1) The department has evaluated the prospective guardian under the department's authority under § 9-20-122 and promulgated department policy; or

(2) The department has evaluated the prospective custodian under the department's authority under § 9-20-122 and promulgated department policy.

History. Acts 1985, No. 940, § 8; A.S.A. 1947, § 57-827; Acts 1993, No. 416, § 1; 2003, No. 1185, § 280; 2007, No. 862, § 3; 2009, No. 301, § 2; 2011, No. 1027, § 2; 2013, No. 1137, § 2.

Amendments. The 2013 amendment, in the introductory language of (b), deleted the phrase "the provisions in" after "notwithstanding," inserted "whose home has been opened under § 9-28-409 either as a foster home or as an adoptive home," after "felon," and deleted (b)(1) and (b)(2).

28-65-204. Preferences.

CASE NOTES

Analysis

Best Interest of Ward.
Parents.
Relatives Other Than Parent.

Best Interest of Ward.

Aunt was properly appointed as the guardian of two children under § 28-65-210 where it was in the best interest of the children in order to protect them from the effects of their mother's abusive relationship, and the aunt was qualified and suitable to act as the guardian. Even though the mother had ended the relationship and completed classes and counseling, the natural-parent preference was merely one facet of the case, and the mother was unable to provide for the emotional needs of the children. Gantt v. Ark. Dep't of Human Servs., 2013 Ark. App. 217, — S.W.3d — (2013).

Parents.

Paternal grandmother was not appointed the guardian of her grandchild because the mother was preferred under subsection (a) of this section, and a trial court did not find that the mother was unfit; evidence regarding the mother's shortcomings was largely controverted, and the trial court considered allegations that the mother had been deceptive to healthcare providers. Even though the mother's sexual relationships could have had a significant effect on the children in the household, the mother was married at the time of a final hearing. Marcellus v. Mays, 2012 Ark. App. 304, — S.W.3d — (2012).

Relatives Other Than Parent.

Subsection (a) of this section, the natural parent preference statute, did not require a grandmother seeking custody of her grandchildren to prove that the children's natural mother was an unfit mother. The best interest of the children was served by placement with their grandmother, given evidence that the children were dirty, flea-bitten, and injured when they returned from their mother's home. Furr v. James, 2013 Ark. App. 181, — S.W.3d — (2013).

Cited: Troeskyn v. Herrington (In re S.H.), 2012 Ark. 245, — S.W.3d — (2012).

28-65-210. Proof required for appointment of guardian.

CASE NOTES

Evidence.

Aunt was properly appointed as the guardian of two children under this section where it was in the best interest of the children in order to protect them from the effects of their mother's abusive relationship, and the aunt was qualified and suitable to act as the guardian. Even though the mother had ended the relationship and completed classes and counseling, the natural-parent preference was merely one facet of the case, and the mother was unable to provide for the emotional needs of the children. Gantt v. Ark. Dep't of Human Servs., 2013 Ark. App. 217, — S.W.3d — (2013).

Cited: Troeskyn v. Herrington (In re S.H.), 2012 Ark. 245, — S.W.3d — (2012).

Subchapter 3 — Powers and Duties

28-65-301. Duties of guardians generally.

CASE NOTES

Expenditures Proper.

In a case involving the management of an estate, a trial court erred by determining that certain expenditures of behalf of a ward were improper; the guardian was allowed to make gifts on behalf of the ward under § 28-65-308(b), he could continue the ward's practice of supporting family members, continuing donations to the ward's church was acceptable, and expenditures for food and clothing fell within the definition of what was required for maintenance. The law of trusts guided the evaluation of the duties and liabilities of the guardian of an estate. Stautzenberger v. Stautzenberger, 2013 Ark. 148, — S.W.3d — (2013).

28-65-308. Power to borrow money, make gifts, etc.

CASE NOTES

Expenditures Proper.

In a case involving the management of an estate, a trial court erred by determining that certain expenditures of behalf of a ward were improper; the guardian was allowed to make gifts on behalf of the ward under subsection (b) of this section, he could continue the ward's practice of supporting family members, continuing donations to the ward's church was acceptable, and expenditures for food and clothing fell within the definition of what was required for maintenance. The law of trusts guided the evaluation of the duties and liabilities of the guardian of an estate. Stautzenberger v. Stautzenberger, 2013 Ark. 148, — S.W.3d — (2013).

Subchapter 4 — Termination of Guardianship

SECTION.

28-65-401. Termination generally.

(a) A guardianship is terminated:

(1) If the guardianship was solely because of the ward's incompetency for a cause other than minority, by an adjudication of the competency of the ward;

(2) By the death of the ward;

(3) If the guardianship was solely because of the ward's minority, the marriage of the ward shall terminate a guardianship of the person, but not of the estate of the ward except with respect to the ward's earnings for personal services; or

(4) If the guardianship was solely because of the ward's minority, by the ward's reaching the age of majority, unless the guardian receives a guardianship subsidy from the Department of Human Services, then the guardianship is terminated when the ward:

(A) Reaches twenty-one (21) years of age; or

(B) Who is eighteen (18) years of age or older requests termination of the guardianship.

(b) A guardianship may be terminated by court order after such notice as the court may require:

(1)(A) If the guardianship was solely because of the ward's minority, and either the ward attains his or her majority or the disability of minority of the ward is removed for all purposes by a court of competent jurisdiction.

(B) However, if the court finds upon a proper showing by substantial competent evidence that it is in the best interest of the ward that the guardianship be continued after the ward reaches majority, the court may order the guardianship to continue until such time as it may be terminated by order of the court;

(2) If the ward becomes a nonresident of this state; or

(3) If, for any other reason, the guardianship is no longer necessary or for the best interest of the ward.

(c)(1) When a guardianship terminates otherwise than by the death of the ward, the powers of the guardian cease, except that a guardian of the estate may make disbursements for claims that are or may be allowed by the court, for liabilities already properly incurred for the estate or for the ward, and for expenses of administration.

(2) When a guardianship terminates by the death of the ward, the guardian of the estate may proceed under § 28-65-323, but the rights of all creditors against the ward's estate shall be determined by the law governing decedents' estates.

History. Acts 1985, No. 940, § 45; A.S.A. 1947, § 57-864; Acts 2013, No. 577, § 4.

Amendments. The 2013 amendment added (a)(4).

CASE NOTES

Analysis

Best Interests of Ward.
Termination Warranted.

Best Interests of Ward.

Denial of the mother's petition to terminate guardianship was improper because this section was not applied to her in the least restrictive available method where there was no weight given to her decision to terminate despite the presumption that she acted in her child's best interest. Therefore, the application of this section violated the mother's constitutional right. Troeskyn v. Herrington (In re S.H.), 2012 Ark. 245, — S.W.3d — (2012).

Termination Warranted.

Child's natural parent who had consented to the guardianship of the child so that she could join the military and who was never found to be unfit as a parent was entitled to have the guardianship terminated because she put forth evidence that the guardianship was no longer necessary, as she had been discharged from the military, and the guardian failed to rebut the presumption that termination was in the child's best interest. The trial court's determination that the guardian did not rebut the presumption that the parent was acting in the child's best interest was not clearly erroneous, particularly because, where the case involved a child, the trial court's evaluation of the witnesses, their testimony, and the best interest of the child was entitled to a high degree of deference. Witham v. Beck, 2013 Ark. App. 351, — S.W.3d — (2013).

Subchapter 7 — Public Guardian for Adults

SECTION.
28-65-703. Public Guardian for Adults — Duties.

28-65-703. Public Guardian for Adults — Duties.

(a) The Public Guardian for Adults:

(1) Shall administer and organize the work of the Office of Public Guardian for Adults;

(2) May employ staff as necessary to carry out the functions of the office, including the employment of Deputy Public Guardians for Adults who:

(A) Meet the same qualifications as required for the Public Guardian for Adults in § 28-65-702;

(B) Have the same power and duties as the Public Guardian for Adults except those related to the administration and organization of the Office of Public Guardian for Adults; and

(C) May act on behalf of the Public Guardian for Adults in matters related to guardianships held by the Public Guardian for Adults; and

(3)(A) May accept the services of volunteers who shall possess all of the qualifications of a guardian required under § 28-65-203.

(B) If approved by the Public Guardian for Adults, the volunteer shall be reimbursed for expenses in the same manner as public employees.

(C) A volunteer shall not be an employee of any facility or program that provides services to the ward.

(D) Volunteers shall not be related to the owner or any staff member of any facility or program that provides services to the ward.

(b)(1) The Public Guardian for Adults shall receive and review referrals for adult guardianship.

(2) A court shall not appoint the Public Guardian for Adults as the guardian of a person or estate unless the Public Guardian for Adults petitions for the guardianship and consents to the appointment.

(c) The Public Guardian for Adults may petition to be appointed guardian of the person of an adult or guardian of the estate of an adult, or both, if:

(1) The Public Guardian for Adults has probable cause to believe that the adult lacks the capacity to make and communicate decisions necessary for his or her health, safety, and welfare or to manage his or her property;

(2) The Public Guardian for Adults believes that the adult is incapacitated;

(3) There is no suitable private guardian qualified and willing to accept the guardianship appointment; and

(4) A circuit court determines that the Public Guardian for Adults would be a suitable guardian for the incapacitated adult.

(d) If requested by the court having jurisdiction of the ward, the Public Guardian for Adults may petition to intervene in an established guardianship and petition to be named a successor guardian if all of the following conditions are met:

(1) The Public Guardian for Adults determines that the current guardian is unable or unwilling to perform his or her duties under the guardianship;

(2) There is no suitable private guardian qualified and willing to accept the guardianship appointment; and

(3) A circuit court determines that the Public Guardian for Adults would be a suitable guardian for the incapacitated adult.

(e)(1) The Public Guardian for Adults either directly or through staff or volunteered services shall monitor each ward and each ward's care and progress on a continuing basis.

(2) The monitoring shall include quarterly personal contact with each ward.

(3) A written record shall be created and maintained concerning each personal contact and shall contain the information specified in § 28-65-322.

(f)(1) The Public Guardian for Adults shall keep and maintain financial, case control, and statistical records in accordance with generally accepted professional business and accounting standards in all cases for which the Office of Public Guardian for Adults has been appointed guardian.

(2) Office records that identify individuals for whom the office has provided guardianship services shall be kept confidential except to the extent that disclosure is required by other laws.

(3) Office records shall be retained in accordance with state record retention rules.

(g) Unless specifically provided otherwise in this subchapter, this chapter is applicable to any guardianship established under this subchapter.

History. Acts 2007, No. 862, § 4; 2013, No. 582, § 1.

Amendments. The 2013 amendment rewrote (a)(2); redesignated former (b) as (b)(1); added (b)(2); and substituted "estate" for "property" in the introductory language of (c).

CHAPTER 68

UNIFORM POWER OF ATTORNEY ACT

Subchapter 2 — Authority

28-68-202. Incorporation of authority.

CASE NOTES

Application of Statute.

Ademption of a devise did not take place as to unexpended, identifiable proceeds of a timber sale because the timber was sold by an attorney-in-fact at a time when the testatrix was incompetent, and the testatrix did not regain testamentary capacity before her death; the statute did not preclude such a holding because while the estate was unquestionably bound by the sale of the timber, the statute was silent on the issue of who was entitled to the proceeds of the sale. Rodgers v. Rodgers, 2012 Ark. 200, — S.W.3d — (2012).

CHAPTER 69

FIDUCIARIES GENERALLY

SUBCHAPTER.

2. Banks and Trust Companies.

Subchapter 1 — General Provisions

28-69-102. Definitions.

CASE NOTES

Public Policy.

Trial court considered case law from other jurisdictions that permitted the modification the trustee requested in this case, in order to qualify a beneficiary for public benefits, but the trial court did not find that the modification was permissible under public policy and Arkansas law; the court was not left with a firm conviction that a mistake was committed. In re Ruby G. Owen Trust, 2012 Ark. App. 381, — S.W.3d — (2012).

Trustee intended to modify the trust in order to qualify a beneficiary for public benefits; because impoverishing the beneficiary in order to qualify her would make the trust provisions void, the modified provisions would have been void on grounds of public policy, and the trial court's denial of the modification motion was that the purpose for modifying the trust would be defeated. In re Ruby G. Owen Trust, 2012 Ark. App. 381, — S.W.3d — (2012).

Subchapter 2 — Banks and Trust Companies

28-69-206. Deposit of funds — Collateral for uninsured deposit.

An Arkansas-chartered bank or savings and loan association that holds as trustee funds awaiting investment or distribution, if not prohibited by the instrument or judgment creating the trust, may deposit the funds in the commercial department of the bank or savings and loan association. However, if the amount of the deposit exceeds the Federal Deposit Insurance Corporation insurance coverage, the bank or savings and loan association shall pledge, as security for the payment of the deposit, bonds constituting general obligations of the United States or the State of Arkansas of a market value not less than the uninsured portion of the deposit.

History. Acts 1981, No. 837, § 1; A.S.A. 1947, § 58-120; Acts 2013, No. 1137, § 3.

Amendments. The 2013 amendment substituted "that" for "which" in the first sentence, and deleted "or Federal Savings and Loan Insurance Corporation" following "Insurance Corporation."

Subchapter 3 — Incorporation of Powers by Reference

28-69-301. Definitions.

CASE NOTES

Applicability.

State was entitled to the $5016.61 in appellant's inmate account under the Arkansas State Prison Inmate Care and Custody Reimbursement Act, §§ 12-29-501 to 12-29-507 for a portion of the cost of housing appellant, because any money appellant received as a gift from his mother that was deposited into his inmate account was clearly within § 12-29-502(4)'s definition of the term "estate." This section, which defined "estate" the context of fiduciary relationships, did not apply. MacKool v. State, 2012 Ark. 287, — S.W.3d — (2012).

Subchapter 4 — Revocation, Modification, or Termination of Trust

28-69-401. Consent.

CASE NOTES

Analysis

Modification Denied.
Termination Denied.

Modification Denied.

Trial court considered case law from other jurisdictions that permitted the modification the trustee requested in this case, in order to qualify a beneficiary for public benefits, but the trial court did not find that the modification was permissible under public policy and Arkansas law; the court was not left with a firm conviction that a mistake was committed. In re Ruby

G. Owen Trust, 2012 Ark. App. 381, — S.W.3d — (2012).

Trustee intended to modify the trust in order to qualify a beneficiary for public benefits; because impoverishing the beneficiary in order to qualify her would make the trust provisions void, the modified provisions would have been void on grounds of public policy, and the trial court's denial of the modification motion was that the purpose for modifying the trust would be defeated. In re Ruby G. Owen Trust, 2012 Ark. App. 381, — S.W.3d — (2012).

Termination Denied.

Circuit court did not err in granting a motion for directed verdict in an action to terminate a trust, because the beneficiary failed to meet her burden of proof under the statutory procedures set forth in this section and § 28-73-411; there was no evidence of a change in circumstances between the establishment of the trust and the settlor's death that would frustrate the purpose of the trust. Neither the timing of the settlor's death, nor the fact that the beneficiary had to disrupt her employment to care for her mother were unforeseen circumstances that frustrated the purpose of the trust. Buckalew v. Arvest Trust Co., N.A., 2013 Ark. App. 28, — S.W.3d — (2013).

Circuit court did not err in granting a motion for directed verdict in an action to terminate a trust, because the beneficiary failed to meet her burden of proof under the statutory procedures set forth in this section and § 28-73-411; there was no evidence of a change in circumstances between the establishment of the trust and the settlor's death that would frustrate the purpose of the trust. Neither the timing of the settlor's death, nor the fact that the beneficiary had to disrupt her employment to care for her mother were unforeseen circumstances that frustrated the purpose of the trust. Buckalew v. Arvest Trust Co., N.A., 2013 Ark. App. 28, — S.W.3d — (2013).

CHAPTER 72

PARTICULAR TRUSTS

Subchapter 4 — Arkansas Custodial Trust Act

28-72-409. Use of custodial trust property.

CASE NOTES

Expenditures Proper.

In a case involving the management of an estate, a trial court erred by determining that certain expenditures of behalf of a ward were improper; the guardian was allowed to make gifts on behalf of the ward under § 28-65-308(b), he could continue the ward's practice of supporting family members, continuing donations to the ward's church was acceptable, and expenditures for food and clothing fell within the definition of what was required for maintenance. The law of trusts guided the evaluation of the duties and liabilities of the guardian of an estate. Stautzenberger v. Stautzenberger, 2013 Ark. 148, — S.W.3d — (2013).

28-72-417. Distribution on termination.

CASE NOTES

Not Applicable to Inter Vivos Trusts

Circuit court erred in ruling that the interests of beneficiaries who predeceased the surviving settlor of an inter vivos trust lapsed upon the death of the beneficiaries; rather, the beneficiaries' descendants were entitled to the beneficiaries' shares of the trust distribution under subdivision (a)(3)(iv) of this section, which provides for a deceased beneficiary's interest in a cus-

todial trust to pass to the beneficiary's estate, did not apply to an inter vivos trusts. Tait v. Cmty. First Trust Co., 2012 Ark. 455, — S.W.3d —, 2012 Ark. LEXIS 487 (Dec. 6, 2012).

CHAPTER 73

ARKANSAS TRUST CODE

Subchapter 1 — General Provisions and Definitions

28-73-112. Rules of construction.

CASE NOTES

Lapse of Deceased Beneficiary's Interest

Circuit court erred in ruling that the interests of beneficiaries who predeceased the surviving settlor of an inter vivos trust lapsed upon the death of the beneficiaries; rather, the beneficiaries' descendants were entitled to the beneficiaries' shares of the trust distribution. Tait v. Cmty. First Trust Co., 2012 Ark. 455, — S.W.3d —, 2012 Ark. LEXIS 487 (Dec. 6, 2012).

Subchapter 4 — Creation, Validity, Modification, and Termination of Trust

28-73-411. Modification or termination of noncharitable irrevocable trust by consent.

CASE NOTES

Termination Denied.

Circuit court did not err in granting a motion for directed verdict in an action to terminate a trust, because the beneficiary failed to meet her burden of proof under the statutory procedures set forth in §§ 28-69-401, 28-73-411; there was no evidence of a change in circumstances between the establishment of the trust and the settlor's death that would frustrate the purpose of the trust. Neither the timing of the settlor's death, nor the fact that the beneficiary had to disrupt her employment to care for her mother were unforeseen circumstances that frustrated the purpose of the trust. Buckalew v. Arvest Trust Co., N.A., 2013 Ark. App. 28, — S.W.3d — (2013).

Circuit court did not err in granting a motion for directed verdict in an action to terminate a trust, because the beneficiary failed to meet her burden of proof under the statutory procedures set forth in §§ 28-69-401, 28-73-411; there was no evidence of a change in circumstances between the establishment of the trust and the settlor's death that would frustrate the purpose of the trust. Neither the timing of the settlor's death, nor the fact that the beneficiary had to disrupt her employment to care for her mother were unforeseen circumstances that frustrated the purpose of the trust. Buckalew v. Arvest Trust Co., N.A., 2013 Ark. App. 28, — S.W.3d — (2013).

28-73-415. Reformation to correct mistakes.

CASE NOTES

Analysis

Evidence.
Illustrative Cases.

Evidence.

In a trust reformation action, as a settlor's hearsay statements regarding who should or would benefit from the trust had no bearing on whether the estate itself would benefit from the trust corpus, they were not against the interest of the declarant's estate and thus were not admissible under Ark. R. Evid. 804(b)(3) as statements against interest. Eft v. Rogers, 2012 Ark. App. 632, — S.W.3d —, 2012 Ark. App. LEXIS 744 (Nov. 7, 2012).

Where appellants petitioned to reform a family revocable trust to remove appellee as residual beneficiary, the trial court did not abuse its discretion in excluding hearsay testimony regarding certain aspects of the settlor's emotions and relationship that were not affirmative statements of her intent to amend the trust, and thus, were not admissible under Ark. R. Evid. 803(3) as evidence of her intent to do something in the future. Eft v. Rogers, 2012 Ark. App. 632, — S.W.3d —, 2012 Ark. App. LEXIS 744 (Nov. 7, 2012).

Illustrative Cases.

Court properly denied appellants' petition under this section to reform a trust, as they did not show the settlor was not competent when she amended the trust and did not meet the high burden of proof required to remove appellee as the residual beneficiary or to prove that a mistake was made in the drafting of the estate-planning documents. Eft v. Rogers, 2012 Ark. App. 632, — S.W.3d —, 2012 Ark. App. LEXIS 744 (Nov. 7, 2012).

Subchapter 6 — Revocable Trusts

28-73-602. Revocation or amendment of revocable trust.

CASE NOTES

Intent.

Circuit court was not clearly wrong in finding that there was clear and convincing evidence that the decedent had transferred his interest in the partnership to the trust, because an attorney involved in preparing the decedent's estate plan testified as to an exchange of emails in which he described the decedent's interest in the family partnership as being held in the revocable trust. Ashley v. Ashley, 2012 Ark. App. 236, — S.W.3d — (2012).